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IN THE

Supreme Court of the United States

October Term, 1964

No. 304

SAMUEL CARTHAN,

Petitioner,

—against—

SHERIFF, CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review a judgment of the United States Court of Appeals for the Second Circuit, entered on April 6, 1964 which judgment unanimously affirmed an order of the United States District Court for the Eastern District of New York denying the above-named petitioner's petition for a writ of habeas corpus.

Previous Proceedings

The Second Additional Grand Jury of the County of Kings, for the September, 1961 Term, as extended, had been conducting an investigation into the construction of new homes in the Canarsie and Mill Basin areas of Kings

County. The Grand Jury was seeking to determine whether the crimes of conspiracy, bribery, corruption, and other crimes had been committed by certain builders, contractors, and public officials.

The September, 1961 Grand Jury had been hearing testimony and had subpoenaed the books and records of builders, contractors, public agencies and public officials. In addition, certain employees of the Building Department of the City of New York had submitted completed financial questionnaires to the Grand Jury, which reflected their financial condition during the years of their employment.

There was evidence before the Grand Jury that certain one and two-family homes in the Canarsie and Mill Basin areas of Kings County had been constructed in violation of the Building Code of the City of New York, and that other crimes may have been committed in connection therewith. All phases of such construction were subject to the inspection and approval of certain employees of the Building Department of the City of New York assigned to the Brooklyn office.

Petitioner was and is a plaster inspector employed by the Building Department of the City of New York in Kings County. Petitioner's duties were to make inspection of new home construction to determine whether the requirements of the Building Code of the City of New York had been complied with prior to the issuance of a Certificate of Occupancy, by the Building Department. There was evidence before the Grand Jury that with respect to certain homes inspected by petitioner the Building Code requirements concerning plastering had not been complied

with. Further, records, in the possession of the Grand Jury, contained written notations of numerous alleged payments of monies to City inspectors of these homes.

Petitioner appeared before the Grand Jury on December 5, 1961, executed a Limited Waiver of Immunity, and testified. Thereafter, on February 26, 1962, petitioner submitted, at the request of the Grand Jury, financial questionnaires for the years 1959, 1960, and 1961. Subsequently, the Grand Jury issued a subpoena *duces tecum* to the petitioner, directing him to produce copies of his Federal and State income tax returns for the years 1959, 1960, and 1961.

On September 24, 1962, the petitioner appeared before the Grand Jury in response to the subpoena *duces tecum*. Petitioner refused to produce copies of his Federal and State income tax returns for the years stated, contending that the Grand Jury had no legal right to request their production.

Thereupon, the District Attorney of Kings County moved in the Supreme Court of the State of New York, Kings County, for an order directing petitioner to comply with said subpoena. Said motion was granted by Mr. Justice Miles F. McDonald, who by an order dated November 5, 1962, directed the petitioner to appear before said Grand Jury and comply with said subpoena by producing the aforesaid Federal and State income tax returns. (Application of Second Additional Grand Jury, 234 N.Y.S. 2d 64.) Petitioner appeared before said Grand Jury on November 21, 1962, and again refused to comply with said subpoena and the direction contained in the order of Mr. Justice Miles F. McDonald, dated November 5, 1962.

Based upon appellant's refusal to comply with the order of Mr. Justice McDonald, dated November 5, 1962, the District Attorney moved to punish appellant for criminal contempt of court pursuant to Section 619 of the Code of Criminal Procedure and Section 750 of the Judiciary Law.

Said matter came on before Mr. Justice McDonald in the Supreme Court of the State of New York, Kings County, Criminal Term, Part I, on December 17, 1962. Mr. Justice McDonald again directed petitioner to comply with the direction of the Court. Petitioner, then and there, wilfully refused to comply with the order of said Court to produce copies of his Federal and State income tax returns for the years in question. Mr. Justice McDonald thereupon granted the motion adjudging petitioner in criminal contempt of court.

The order so adjudging petitioner in criminal contempt of court is the underlying subject of this appeal.

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department by an order made and entered on March 18, 1963, unanimously affirmed without opinion the order of commitment adjudging petitioner to be in criminal contempt.

Thereafter, on April 29, 1963, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denied petitioner's application for leave to appeal to the Court of Appeals of the State of New York from the order of affirmance made and entered on March 18, 1963.

On May 20, 1963, counsel for petitioner appeared before Judge Stanley H. Fuld, an Associate Judge of the Court

of Appeals of the State of New York in his chambers, for the purpose of seeking a stay pending the hearing and determination of the application for leave to appeal to the Court of Appeals. After apprising Judge Fuld of the relevant facts, the District Attorney consented that the order below be stayed pending the hearing and determination of the application for leave to appeal. The Court of Appeals of the State of New York denied petitioner's application for leave to appeal on July 10, 1963.

On November 20, 1963 petitioner's application for a writ of habeas corpus was denied by Honorable Walter Bruchhausen, a Judge of the Federal District Court, Eastern District of New York.

The United States Court of Appeals for the Second Circuit, by judgment entered on April 6, 1964, unanimously affirmed the order of the District Court, denying the application for a writ of habeas corpus.

POINT I

An investigation by a Grand Jury involves all the powers necessary to a complete inquiry.

An investigation by a Grand Jury involves all the powers necessary for a complete inquiry and includes the power of compulsory process or subpoena. *People ex rel. Karlin v. Culkin*, 248 N.Y. 465. It has the widest latitude in the exercise of its power and in the absence of a clear constitutional or legislative expression to the contrary, such powers may not be curtailed. *People* v. *Stern*, 3 N.Y. 2d 658. It has always had the power to subpoena all types of relevant records. Its subpoenas have been held to be pre-

sumptively valid, and they can only be challenged by an affirmative showing of impropriety or bad faith. *Matter of Edge Ho Holding Corporation,* 256 N.Y. 374; *Manning* v. *Valente,* 272 App. Div. 358, Affirmed 297 N.Y. 681; *Application of Ryan,* 281 App. Div. 953, Appeal dismissed 306 N.Y. 11 (Labor Union records held procurable); *In re Ericson's Will,* 200 Misc. 1005 (hospital records held subject to subpoena); *People* v. *Doe,* 247 App. Div. 324, Affirmed 272 N.Y. 473 (Bank accounts held subject to subpoena); *Application of Inter-City Associates,* 207 Misc. 1012 (Corporate records held obtainable). Grand Juries have the power to initiate full investigations on their own motion into any area in which they suspect crime, and witnesses cannot set limits to the inquiries that Grand Juries may conduct. *Blair* v. *U.S.,* 250 U.S. 273, 282.

The broad powers of a Grand Jury investigating corruption in public office should not be hampered and curtailed by ultra-refined contentions.

POINT II

The information requested by the subpoena *duces tecum* served upon this witness is material and relevant to the Grand Jury's investigation into the alleged bribery and corruption of certain City employees.

The issuance of a subpoena *duces tecum* by a Grand Jury is within its power and must be complied with by a witness if the demand is not unduly burdensome and the documents sought are in any way relevant to the Grand Jury's inquiry. *Spector* v. *Allen,* 281 N.Y. 251; *Moore* v. *Delaney,* 180 Misc. 844; *Application of Slipyan,* 208 Misc. 515, Appeal dismissed 786 App. Div. 1091; *Barr* v. *Dolphin Hold-*

ing Corp., 141 N.Y.S. 2d 906; *Smith* v. *Russo-Asiatic Bank*, 170 Misc. 408; *People* v. *Doe*, 156 Misc. 304.

The Grand Jury is not seeking the records of any official agency, but merely the personal records of a witness. His income tax returns should be considered in the same light as any other personal records. The demand that the witness submit copies of his Federal and State income tax returns to the Grand Jury can certainly be in no way oppressive nor create an undue burden, since the witness has testified under oath that he has such copies in his possession. Consequently, no hardship would be worked on the witness since it will require no effort on his part to produce these documents. The courts have even directed the person to obtain copies of his tax returns from the Government when he had no such copies in his possession. *Elmer* v. *Byrd*, 220 N.Y.S. 2d 985, aff'd 227 N.Y.S. 2d 248.

The Grand Jury desires to have these returns in order that they may be used in connection with financial questionnaires already submitted by the witness for the years in question and in connection with his testimony concerning them. The propriety of requiring a witness to furnish the Grand Jury with financial questionnaires has been established in *People ex rel. Sillifant* v. *Sheriff*, 6 N.Y. 2d 487. The records sought are relevant to the Grand Jury's investigation and are necessary to give proper meaning to the questionnaires in its possession.

> "The Grand Jury is an arm of the Court. Its subpoenas are presumptively valid and can only be challenged by an affirmative showing of impropriety . . . No witness may avoid obedience to the directions of the court without establishing by concrete evidence that the subpoena was issued in bad faith

> or that it is for some other reason invalid. These rules inhere in the very nature of the grand jury's function and of its authority. (Citations omitted) Nor may petitioner refuse to produce documents and records under a subpoena Duces Tecum unless he can show that the documents are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the court." *Manning* v. *Valente, supra,* p. 361.

In an investigation into bribery, an historic avenue of approach is an examination into the financial affairs of the public servant. Evidence of possession of financial assets or income in amounts not justified or accountable for by salary and other legitimate origins is a pertinent source of inquiry where the misconduct of a public officer is the subject of the probe. *People* v. *Connelly,* 253 N.Y. 330, 340, 341.

The witness has executed a limited waiver of immunity, and consequently the documents sought are not subject to the privilege of self-incrimination. There are no statutory or other prohibitions against their production and no reason why the subpoena of this Grand Jury is in any way improper.

Needless to say, we do not suggest that either the District Attorney or the Grand Jury should be permitted to sacrifice fundamental or constitutional rights of a witness upon the altar of expediency or to simplify and ease a burdensome task of law enforcement authorities. But our contention is that compulsion here to produce these records violates no fundamental or constitutional prerogative of this witness before the Grand Jury, since he has chosen to waive his constitutional privilege against self incriminations. *People ex rel. Sillifant* v. *Sheriff, supra.*

POINT III

Copies of income tax returns and other personal financial records have been required to be produced in legal proceedings.

If the privilege against self-incrimination is inapplicable to these records, or has been waived, then they can stand in no light different from any other type of record, which is subject to subpoena by a Grand Jury where relevant to its investigation. In *In the Matter of the Brooklyn Bar Association;* 19 M. 2d 491, a subpoena duces tecum was issued in connection with a judicial inquiry ordered by the Appellate Division of the Supreme Court into improper practices of attorneys, requiring the production of all of the attorney's business and personal financial records for a four year period. The Court held that the subpoena was proper, that it was not so broad as to be unjust or unreasonable, that there was no illegal search and seizure, and that it was not contrary to the 14th Amendment. There were similar holdings in connected cases. *Anonymous No. 14,* 7 A.D. 2d 874; *Anonymous No. 16 et al.,* 7 A.D. 2d 874.

In civil actions also, copies of income tax returns have been held to be discoverable where they were relevant to the issues presented by the pleadings; and in some decisions, the courts have even directed the person to obtain copies from the Government where he had no such copies in his possession. *Elmer* v. *Byrd,* 220 N.Y.S. 2d 985, Affirmed 227 N.Y.S. 2d 248; *Wornicke* v. *Scheuer,* 11 M. 2d 188; *Gould* v. *Sullivan,* 54 N.Y.S. 2d 430, Affirmed 269 App. Div. 737.

The secrecy imposed by Section 384 of the New York State Tax Law and Title 26, Section 6103 of the Internal

Revenue Code only prohibits disclosures by officers of governmental agencies except in accordance with proper judicial order, or as otherwise provided by law, not by the taxpayer himself. *U.S.* v. *O'Mara*, 122 Fed. Supp. 399. It would appear that the intent and purpose of these sections is to prevent the disclosure of confidential information to those who do not have a legitimate interest in it. *Application of Umbach, Okl.*, 350 Pac. 2d 299, *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190, 192 (D. Conn.).

There is legal precedent sustaining the Grand Jury's right to subpoena copies of the Federal and State income tax returns of a witness. The witness has stated that such copies are in his possession, he has executed a limited waiver of immunity, and the documents sought are relevant and necessary to the Grand Jury investigation.

POINT IV

Section 1123 (formerly Section 903) of the New York City Charter does not contravene any of petitioner's cognizable constitutional rights.

We believe that any discussion by us as to the constitutional validity of Section 1123 would be egregious and largely academic. The constitutionality of Section 1123 has been sustained.

Matter of Koval v. *Board of Education*, 197 Misc. 221;

Matter of Goldway v. *Board of Higher Education*, 178 Misc. 1023.

The *Slochower* case, cited by petitioner is inapposite. *Slochower* should be limited to the peculiar facts of that case.

Slochower v. *Board of Education*, 350 U.S. 551;
Cohen v. *Hurley*, 366 U.S. 117, 125;
Matter of Lerner v. *Casey*, 357 U.S. 468, 477;
McAuliffe v. *New Bedford*, 155 Mass. 216, 220.

In *Slochower*, the witness was appearing before a congressional committee which was conducting an investigation into subversive influences in the American educational system, and had not executed a waiver of immunity. The following appeared in the majority opinion in *Slochower* at 350 U.S. 558:

> "Here the Board has possessed the pertinent information for 12 years and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to college function. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

Furthermore, the Court stated, in *Slochower* at 558, it was quite another thing;

> ". . . for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at the property, affairs, or government of the City, or . . . official conduct of city employees."

In the instant case, we have a duly authorized state grand jury specifically investigating official conduct of city employees. Therefore, as Section 1123 of the City Charter has been applied in the instant case, the petitioner has not been deprived of any Federal Constitutional privileges.

Beilan v. *Board of Education*, 357 U.S. 399 (1958);

Garner v. *Board of Public Works*, 341 U.S. 716 (1951).

Of course, petitioner had the right to assert his privilege against self-incrimination. That right was his as it would be the right of any citizen and it was not denied to him. Basic to consideration of this aspect of petitioner's case is the fact that any ultimate discharge from employment based upon his failure to execute a limited waiver of immunity would be predicated not upon any unfavorable inference to be drawn from his failure to do so and testify or any assertion of his constitutional privileges, but solely upon his refusal to discharge obligations which, as an employee of the City of New York, he owed to cooperate in an investigation into alleged bribery and corruption in the conduct of his office. The faithless public servant disturbs the welfare of countless thousands. A government employee need no longer be entrusted with public office and trust, if he refuses to explain to proper authority his conduct in office.

Matter of Lerner v. *Casey, supra;*
Cohen v. *Hurley, supra;*
People ex rel. Sillifant v. *Sheriff, supra;*
People v. *Connelly, supra.*

POINT V

Petitioner's contention that his waiver of immunity was exacted through the duress of Section 1123 (formerly Section 903) of the New York City Charter is without substance.

We urge that the provisions of the New York State Constitution, Article 1, Section 6, and Section 1123 of the New

York City Charter do not constitute *legal* duress. Even if we assume that petitioner signed the waiver through fear of losing his office as a plaster inspector, it would not constitute duress cognizable in law. His act was voluntary. Legal duress connotes wrongful or venal conduct by a contracting party exerted against another. (Restatement of Law of Contracts, Section 493, cited with approval in *Williston, on Contracts,* Revised Ed., Vol. V, page 4497). In *Deshong* v. *City of New York,* 176 N.Y., 475, 479, the Court said:

> "Payment coerced by duress or unlawful compulsion may be recovered back. The coercion however, must be illegal, unjust or oppressive."

Williston, supra, at page 4500 says:

> "One element of the early law of duress continues to exist, however its boundaries may be otherwise extended. The pressure must be wrongful and not all pressure is wrongful."

At bar, petitioner was confronted with the alternative of forfeiting his office or executing the waiver. No wrongful pressure was exercised by the statute or the constitution. He could have refused to execute the document and have instituted legal proceedings to contest the forfeiture of his office. In such event no legal duress could be posited.

Board of Trustees v. *O. D. Wilson Co.,* 133 Fed. 2d 399.

In addition, we urge that the determination of the constitutional validity of petitioner's waiver of immunity is not properly *sub judice.* That issue should be resolved in some other action or proceeding in the event petitioner is indicted for a substantive crime.

Regan v. *New York,* 349 U.S. 59.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: Brooklyn, New York
November, 1964.

Respectfully submitted,

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